In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6931

RICHARD L. MACKAY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-19

CHESTER BREWER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Both petitioners urge that the sentences imposed were unduly harsh and should be reduced. In addition, petitioner Brewer contends that the evidence was insufficient to support his conviction, that separate mailings were improperly made the basis of separate counts, and that the instructions were improper.

After a jury trial in the United States District Court for the District of Utah, each petitioner was convicted on nine counts of mail fraud, in violation of 18 U.S.C. 1341 and 2,

and six counts of fraud in the sale of securities, in violation of 15 U.S.C. 78j(b) and 78ff and 18 U.S.C. 2. Each was sentenced to consecutive terms of imprisonment for one year on each count (a total of fifteen years) and each was fined $27,000. The court of appeals affirmed. On February 4, 1974, it denied motions for rehearing, but partially remanded the case for the purpose of giving the district court an opportunity to reconsider the sentences. *United States* v. *Mackay* (Brewer Pet. App. A-9—A-10; 491 F. 2d 616, 624-625). On January 5, 1974, Mackay petitioned for a writ of certiorari, urging that the sentence imposed was unduly harsh and other grounds. *Mackay* v. *United States*, No. 73-6045, certiorari denied April 29, 1974.

On April 12, 1974, the district court reconsidered its original sentence, pursuant to the direction of the court of appeals. The court adhered to its original sentence, giving its reasons therefor in an extensive opinion (Mackay Pet. App.; Brewer Pet. App. A-12—A-17). No appeals were taken from this order. Mackay's present petition for a writ of certiorari was filed on June 21, 1974; Brewer's petition for a writ of certiorari was filed on July 26, 1974.

The judgment of the court of appeals became final on February 4, 1974, and both petitions for certiorari are therefore out of time under Rule 22(2) of the Rules of this Court. In any event, the contentions sought to be raised are without merit.

The evidence, briefly summarized, showed that Brewer, as secretary-treasurer of Kaymac Industries, Inc., aided and abetted the fraudulent scheme of petitioner Mackay, president of Kaymac, to acquire control of two insurance companies by stripping the assets of one of them to finance the acquisitions. In July 1969 the two arranged to borrow for a very short period the sum of $3,000,000 from Dorsey & Co., a New Orleans brokerage

company, for the purchase of 93 percent of the capital stock of Federated Security Insurance Company. Dorsey & Co. was to recoup its loan by the sale of Federated's assets, which were to be assigned to Dorsey & Co. for that purpose. The $3,000,000 was paid to one Hagan, the president of another insurance company which was the parent company of a corporation owning the controlling stock of Federated. Hagan received an additional $790,000 in mortgages owned by Federated for his sale to Kaymac of a block of stock of Transwestern Life Insurance Company (Brewer Pet. App. A-3).

Dorsey & Co. insisted that the assets of Federated which they had been authorized to sell had to be replaced. Petitioners therefore arranged with United Housing Corporation of New York for the purchase of 4.5 million dollars in government mortgages. These mortgages were reassigned in turn to United Housing as security for the sale and petitioners signed promissory notes for 4.5 million dollars and obligated Federated to repurchase the notes in case of default by Kaymac, the primary obligor in the purchase. The purchase of Federated stock was completed for $3,000,000, advanced temporarily by Dorsey, which recouped its loan plus interest and a substantial commission by sale of Federated's portfolio. Federated received back $531,000 from this sale, which petitioners used to buy stock of Transwestern Insurance Co. for Kaymac. Assets of Federated were used to pay debts of Kaymac and personal obligations of both petitioners. As the court of appeals pointed out, Federated became legally responsible to pay for the mortgages purchased and its title was only a naked legal title which lacked any equity or substance (Brewer Pet. App. A-3—A-4).

1. The evidence was sufficient to establish petitioner Brewer's knowing participation in the scheme to defraud. Petitioner Brewer, during the time period alleged in the indictment, personally performed several steps in the fraudulent scheme (*e.g.*, reassignment of mortgages to United Housing) and aided petitioner Mackay in the performance of other steps in the scheme (Brewer Pet. App. A-5, A-9). The factual determinations in this complicated case were properly made below on sufficient evidence and do not call for further review by this Court.

2. There was no error in assigning a separate count for each mailing. Each mailing involved a separate step in furtherance of the fraudulent scheme and constituted a separate violation.[1] *Badders* v. *United States*, 240 U.S. 391; *United States* v. *Eskow*, 422 F.2d 1060, 1064 (C.A. 2), certiorari denied, 398 U.S. 959; *United States* v. *Williams*, 424 F.2d 344, 351 (C.A. 5), affirmed, 447 F. 2d 1285, certiorari denied, 405 U.S. 954.

3. Petitioner Brewer contends that it was error for the court to fail to give an accomplice instruction as to the testimony of Hagan and Dorsey, who testified for the government, since they were arguably accomplices. It should be noted, however, that petitioners neglected to object specifically to the court's failure to provide this instruction. Even assuming *arguendo* that the court erred in failing to provide an accomplice instruction, the error was harmless in that the case against petitioners was fully proven without reference to the testimony of Hagan and Dorsey. The heart of the

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[1] *United States* v. *Maze*, 414 U.S. 395, cited by Brewer, is wholly inapposite, as pointed out by the court of appeals in ruling on the motion for rehearing (Brewer Pet. App. A-9; 491 F. 2d at 624), since the mailings here were an integral part of the scheme to defraud.

fraudulent scheme was the purchase of Federated by the use of Federated's funds, where petitioner Brewer's participation was established by documentary evidence independent of the testimony of Dorsey or Hagan. In these circumstances the court below properly regarded the failure of the court to give cautionary instructions as to the testimony of Dorsey and Hagan insufficient to justify reversal of petitioners' convictions (Brewer Pet. App. A-6).

Petitioner Brewer also contends that it was error for the court to instruct the jury that statements made "carelessly" are tantamount to fraudulent ones. When considered as a whole, however, the instruction properly conveyed the meaning of "fraudulent statements." The instruction gave as examples of such statements those made without regard to whether they are true or false, statements put forth without a reasonable basis, statements of fact implying knowledge where there is no knowledge, expressions of opinion where the speaker has no opinion in fact, and promises made recklessly without reasonable basis for belief that they can be fulfilled (Brewer Pet. App. A-8; 491 F. 2d at 623). Insertion of the word "carelessly" did not, therefore, render the instructions erroneous.[2]

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[2] The questions other than severity of the sentence sought to be raised by Brewer are substantially those raised by Mackay in No. 73-6045, determined adversely as to Mackay by denial of his petition for a writ of certiorari on April 29, 1974.

4. Petitioners' contention as to the severity of the sentence imposed is not properly before the Court, as the case was partially remanded to the district court for reconsideration of the sentence and no appeal has been taken from the district court's final action. In any event, we submit that in light of the scope and extent of petitioners' fraudulent scheme, the district court did not abuse its discretion in sentencing each petitioner to fifteen years' imprisonment.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

DOJ-1974-11